INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center

VOL.. XXIX, NO. 14 **MAY 3, 2002**

CRIMINAL LAW ISSUES

ABNEY v. STATE, No. 49S02-0204-CR-255, ___ N.E.2d ___ (Ind. Apr. 26, 2002).
BOEHM, J.

After his car struck a bicyclist, Lanny Abney was convicted of several crimes, including operating a vehicle with .10% or more blood alcohol content causing death. The trial court instructed the jury that if the State proved that Abney's "driving conduct was a contributing cause" of the accident the requisite causation would be established. Although an earlier Court of Appeals decision had approved that standard of causation, we agree with the Court of Appeals in this case that the statute requires that the defendant's driving be proven to be a proximate cause of the accident, not merely a contributing cause. We grant transfer, reverse the convictions, and remand for a new trial.

At about 2:30 a.m. on July 9, 1999, Abney headed home from an Indianapolis tavern. As he drove west on Rockville Road toward Danville, his car struck the body of Jon Heffernan, who was bicycling home from work. Abney drove on despite a shattered windshield, a caved-in roof, and a deployed airbag.

. . .

. . .[T]he focus of Abney's trial was whether or not he caused Heffernan's death. At trial, Abney contended it was possible that another vehicle had struck Heffernan first, and thrown Heffernan into Abney's car. To that end, Abney tendered a proposed jury instruction that stated: "If you find that the defendant's conduct caused the accident that produced the death of the victim, the State has proven the element of 'causation.' However, if you find that someone else's conduct caused the accident, you should find the defendant not guilty . . . ."

The trial court refused Abney's tendered instruction and instead gave the jury the following instruction:

> To prove the offense of operating while intoxicated causing death as charged in counts 1 and 2 of the information, the State must prove beyond a reasonable doubt the element of "causation."
>
> In determining whether the defendant caused the death of the victim, you should focus upon the driving conduct of the defendant and not speculation on whether the defendant could have avoided the accident had he been sober.

> If you find that the Defendant's driving conduct was a contributing cause to the accident that produced the death of the victim, the State has proven the element of "causation." . . .

. . . .

. . . Micinski [v. State, 487 N.E.2d 150 (Ind. 1986)] went on to address the proof of causation required to sustain a conviction under the statute:

> There is, of course, a need to show causation; in the typical case a showing that the driver ran into the victim would suffice. . . . .
>
> This is not to say that a drunk driver who hits a child who has run out from between two parked cars is not entitled to ask a jury to find him not guilty because there is reasonable doubt whether he caused the collision.

[Citation omitted.]

. . . .

. . . As we stated in Micinski, "[a]nalysis of this statute should focus on the driver's acts . . . . If the driver's conduct caused the injury, he commits the crime; if someone else's conduct caused the injury, he is not guilty." 487 N.E.2d at 154. This is simply a short-handed way of stating the well-settled rule that the State must prove the defendant's conduct was a proximate cause of the victim's injury or death. [Citations omitted] This was the basis for Abney's defense that, although his vehicle struck Heffernan's body, the evidence tended to show that another vehicle struck Heffernan first and threw Heffernan into Abney's vehicle. If the trier of fact accepts Abney's scenario, Abney's driving may not have been a proximate cause of Heffernan's death.

A "contributing cause" is "a factor that—though not the primary cause—plays a part in producing a result." [Citation omitted.] . . . . Applying the State's reasoning here, all the State would need to prove was that Heffernan did not die until after Abney's vehicle struck him, and that Abney's vehicle striking Heffernan played some part in Heffernan's death. Yet if the jury concluded that Heffernan was unexpectedly hurled in front of Abney's car, Abney would be indistinguishable from the driver striking the darting child.

Abney's tendered instruction used the word "caused," which is the language from Micinski. Refusal to give Abney's instruction, and instructing as to the lesser standard of contributing cause was error. . . .

We agree with the Court of Appeals that Abney was prejudiced by the error as to the first two counts. We note that the instruction on causation did not explicitly refer to the final count, leaving the scene of an accident resulting in death. However, the jury was instructed that, to prove that offense, the State must show the accident caused Heffernan's death. Because the jury was again required to apply a standard of causation, the erroneous instruction prejudiced Abney as to that conviction as well. [Citation omitted.]

SHEPARD, C. J., and DICKSON and RUCKER, JJ., concurred.

SULLIVAN, J., filed a separate written opinion in which he dissented, in part, as follows: I respectfully dissent. I think the instruction used by the trial court here (and approved by the Court of Appeals in Stephenson v. State, 648 N.E.2d 395 (Ind. Ct. App. 1995), trans. denied), is faithful to this court's directives in Micinski v. State, 487 N.E.2d 150 (Ind. 1986).

TRICE v. STATE, No. 49S05-0106-CR-313, ____ N.E.2d ___ (Ind. Apr. 30, 2002).

SHEPARD, C. J.

On direct appeal, the Indiana Court of Appeals reversed, holding that the prosecutor's comments on Trice's post-arrest police interview were fundamental error. Trice v. State, 746 N.E.2d 391 (Ind. Ct. App. 2001). The State petitioned for transfer, arguing the Court of Appeals misapplied this Court's precedent on fundamental error. We granted the petition. 753 N.E.2d 17 (Ind. 2001).

. . . .

As Court of Appeals Judge L. Mark Bailey noted in his dissent in this case, all of the comments made by prosecutors focused on references to the brief post-Miranda statements made by Trice. [Citation omitted.] During the police interview, Trice said "I feel guilty" (R. at 325-26) and "Because I killed him." (R. at 326.) Most significantly, she also said, "I can't remember the gun. I don't know what happened." (R. at 333.) But at trial, she said the shooting was not done "intentionally," (R. at 402), which prompted the prosecutor to ask her if her characterization of the shooting as an accident was being revealed for the first time. [Citation to Record omitted.] . . .

By raising these inconsistencies, the State was employing a legitimate trial tactic. It was comparing her fairly detailed trial testimony with her initial statement to the detectives in which she said "I don't know what happened" and that she couldn't "remember the gun." (R. at 333.)

This situation differs significantly from Jones, in which the State repeatedly asked the defendant "why he had never told the police, the prosecutor, or the press of his innocence." [Citation omitted.] In Jones, the defendant responded at trial that he did not tell anyone of his innocence and remained silent because "he feared the police and that he doubted whether anyone would have believed him." [Citation omitted.] We held that line of questioning to be "an improper commentary on Jones' silence." [Citation omitted.]

The key to Doyle [v. Ohio, 426 U.S. 610 (1976)] is that it protects the defendant from being found guilty simply on the basis of a legitimate choice to remain silent. . . .

But while Doyle bars the use of a defendant's silence for impeachment, "Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent." Anderson [v. Charles], 447 U.S. [404 (1980)] at 408.

The Seventh Circuit confronted a Doyle issue similar to the one raised by Trice in United States v. Scott, 47 F.3d 904 (7th Cir. 1995). . . . In Scott, the defendant waived his Miranda rights and told investigators he was in Indianapolis to pick up some illegal drug money. [Citation omitted.] But at trial, the defendant testified he was picking up the money for other purposes and only mentioned the drug angle in an effort to convince the money holder to give him the cash. [Citation omitted.]

During cross-examination, the government challenged the defendant's trial version and said, "Now you never mentioned to Special Agent Hinkle this story you're telling us today, did you?" [Citation omitted.] During closing arguments, the government again mentioned the omissions and noted that the "most important thing to remember is, we didn't hear that story until he took the stand." [Citation omitted.]

The Seventh Circuit noted that "when a defendant speaks to government agents after having received Miranda warnings, a prosecutor may impeach the defendant by pointing out the inconsistencies between the story he told to police and the story he tells the jury." [Citation omitted.]

Similarly, Trice waived her rights and made several statements about the evening Jones died before invoking her constitutional right to counsel. The State was attempting to show how her trial testimony about an accidental shooting was

inconsistent with her earlier comments that she did not know what happened and could not remember anything about a gun.
BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

CIVIL LAW ISSUE

SCOLERI v. SCOLERI, No. 45A05-0108-CV-381, ___ N.E.2d ___ (Ind. Ct. App. Apr. 26, 2002).
ROBB, J.

Father first argues that the trial court erred in denying his petition for modification of custody because the return derived from the early withdrawal of his 401(k) is not income within the meaning of the Indiana Child Support Guidelines. Mother argues that the return from the cashed 401(k) should be included in the calculation of Father's weekly gross income.

In the present case, Father possessed a 401(k) account with Holden Graphics Company in the amount of $35,000.00 when he left the printing company. On August 3, 1998, Father made an early withdrawal from his 401(k), incurring a penalty of $7,000.00, receiving a return in the amount of $28,000.00. Father essentially "cashed in" the full amount of his 401(k). Father applied $8,000.00 of the return to pay bills and used the remaining amount as a down payment for a home in his then-fiancée's name. In denying Father's petition, the trial court determined that Father's child support obligation should not be reduced in part because he clearly demonstrated the financial ability to pay $325.00 per week in support when he gave his then-fiancée $20,000.00 as a down payment for the home. [Citation to Brief omitted.]

We will first discuss the nature of 401(k) accounts. A 401(k) plan, sometimes called a "salary reduction" plan, is the product of amendments to the Internal Revenue Code, made pursuant to the Revenue Act of 1978 that became effective 1980. [Footnote omitted.] Typically, an employer sets up a 401(k) plan with an investment company, an insurance company, or a bank trust department. The 401(k) plan is unique in that the employee may elect between: (a) having an employer contribute a portion of his or her salary to a 401(k) plan; or (b) having the employer pay the amount directly to him or her. In the first situation, the employee is not taxed currently; however, in the second situation the employee is taxed in the year the income is received. If an employee is faced with genuine financial hardship, [footnote omitted] and the plan so provides, any money of the plan may be withdrawn without penalty. In addition, the employee can take the money in a lump sum after the age of fifty-nine and one-half (59½) years. If the money is withdrawn early, the individual will incur a ten percent (10%) penalty and be required to pay federal, state, and local taxes on the return. We are presented with the question of whether the return from Father's early withdrawal from his 401(k) constitutes income within the meaning of the Indiana Child Support Guidelines.

. . . .

This court was previously faced with the issue of whether the annual return of an IRA [footnote omitted] that is automatically reinvested constitutes income within the meaning of our Guidelines. We concluded that when "the annual returns of a parent's IRA or IRAs are automatically reinvested and there is no indication that previous withdrawals from the IRA have been made to fund the parent's lifestyle choices or living expenses, those returns generally should not be considered 'actual income' when calculating the parent's child support obligation. Such returns are not currently received by the parent nor immediately available for his or her use." [Citation omitted.] We see

no reason why an individual's 401(k) account that is automatically reinvested should be considered any differently under the Indiana Child Support Guidelines.

This case presents a unique situation. Father made an early withdrawal of his 401(k) and the return was received by Father and immediately available for his use. The money was not automatically reinvested. . . . We believe that the return constitutes income within the meaning of the Indiana Child Support Guidelines, especially considering that a portion of the return was spent satisfying certain financial obligations and a portion of the return was utilized as a down payment on a home where Father currently resides with his new wife.

However, the parties agreed and the trial court entered an order awarding Father his 401(k) account as part of the marital property distribution. . . . Therefore, to utilize the return from Father's early withdrawal from his 401(k) in the calculation of his weekly gross income would usurp the equitable split of the marital property in the summary dissolution decree. [Footnote omitted.] Presumably, the parties agreed that Father would retain his 401(k) IRA in exchange for Mother retaining the marital home. [Citation to Brief omitted.] Without any evidence to the contrary, we deem it inequitable to utilize Father's portion of the marital property, his 401(k) account, in the calculation of his weekly gross income. Based on the facts and circumstances of the present case, we hold that it was error for the trial court to utilize Father's return for the early withdrawal of his 401(k) account in calculating his child support obligation. . . .

. . . .

KIRSCH, J., concurred.

SULLIVAN, J., filed a separate written opinion in which he concurred in part and in which he dissented, in part, as follows:

. . . I believe it is incumbent upon us to reverse and remand the matter for reconsideration of the evidence without regard to the 401(k) withdrawal and without regard to the perceived underemployment and to then apply the Child Support Guidelines accordingly.

CASE CLIPS is published by the
Indiana Judicial Center
National City Center - South Tower,
115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
Jane Seigel, Executive Director
Michael J. McMahon, Director of Research
Thomas R. Hamill, Staff Attorney

133